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INJURIOUS AFFECTION AND HIGHWAY PROJECTS

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I. INTRODUCTION

The Court of Appeal's recent decision in *Susan Heyes Inc. dba Hazel & Co. v. Vancouver (City)* 2011 BCCA 77 may have relieved some of the anxiety stemming from the finding of liability in the trial judgment. The Court of Appeal held that either of Translink's authorizing legislation or the Vancouver Charter power to impose street closures were a sufficient basis for a defence of statutory authority to defeat Heyes' nuisance claim. The Court of Appeal the $600,000 award for business losses was overturned and the action dismissed. The Supreme Court of Canada dismissed Heyes' application for leave to appeal the decision of the Court of Appeal.

Heyes is an important case for what it says about the defence of statutory authority (and this paper will return to discuss its influence in another context later). Most local governments though will not likely be involved in rapid transit projects of the scale of the Canada Line. Yet regular road improvement projects that involve partial road closures, the construction of medians and other measures that impact on access may give rise to substantial claims for compensation under the law of injurious affection.

II. THE INJURIOUS AFFECTION TEST AND THE RELATIONSHIP BETWEEN NUISANCE AND INJURIOUS AFFECTION

The leading case which establishes the conditions for injurious affection liability is *R. v. Loiselle* [1962] S.C.R. 624. None of the claimant's property was expropriated but damages for injurious affection were awarded where the authority diverted a highway which resulted in the property being located on a virtual cul-de-sac, 1500 ft. from the intersection of the relocated highway. The Court set out the required conditions for liability which have since been accepted and applied by lower courts and tribunals:

- the damage must result from an act rendered lawful by statutory powers of the person performing such act;
- the damage must be such as would have been actionable under the common law, but for the statutory powers;
- the damage must be an injury to the land itself and not a personal injury or injury to business or trade;
- the damage must be occasioned by the construction of the public work, not by its user.

The second condition, known as the actionable rule, is invariably considered in terms of potential common law nuisance liability. Justice Perell in *Curative Organic Skin Care Ltd. v. Ontario* 2011 ONSC 2041 characterized injurious affection as:

> a nuisance claim in tort that would otherwise be barred by the common law defence of statutory authority because the alleged injury is an inevitable consequence of construction of a work authorized by statute and done without negligence.

The latter part of the paper deals with specific cases involving access limitation claims and will delve further into the application of nuisance law principles. For now, a simple summary of nuisance liability is that it arises where there is an unreasonable interference in the use and enjoyment of land. In the case of road projects that is most commonly an interference with access.

A couple of preliminary observations regarding the actionable rule should be noted. Not all negative impacts are actionable at common law. In *St. Pierre v. Ontario (Minister of Transportation and Communications)* [1987] 1 S.C.R. 906 the Supreme Court of Canada held that claims for what it termed "loss of prospect" did not meet the actionable requirement. The St. Pierres purchased a 125 acre property in a quiet, rural neighbourhood. Several years later the ministry acquired a strip of land for highway construction some 250 feet wide, adjoining the boundary of their land. The owners commenced their claim after the highway was opened to traffic. The Land Compensation Board and the Divisional Court were persuaded that the owners had met the four *Loiselle* conditions. The Ontario Court of Appeal overturned the award of compensation and its decision was upheld by the Supreme Court. There was no evidence of interference with access to the property. Essentially the owners had lost their privacy and the good view they had previously enjoyed. The Supreme Court characterized the claim as one for loss of amenities; an area of damage that the law of nuisance did not recognize as compensable.

The actionable requirement has been interpreted to preclude injurious affection claims against municipalities in cases of non-physical interferences with property rights. In *Hampton Investments v. Nanaimo* (1997) 61 L.C.R. 224 a claim was brought in connection with a setback requirement imposed through development permitting in relation to the Nanaimo Parkway portion of the new Island Highway. The DP guidelines required that a 20 meter strip be kept free of development. In addition to rejecting the claim that the DP area worked a constructive expropriation of a portion of the owner's lands, the Expropriation Compensation Board (ECB) dismissed the owner's injurious affection claim. The action complained of was a legislative act, without any physical interference with property rights. Legislative acts have never been a basis for nuisance liability, and thus could not satisfy the actionable requirement.

Justice Perell's summary, quoted above, address the first two of the four *Loiselle* conditions. As to the third condition – the nature of the damage rule – the law is not uniform across Canada as

a result of statutory intervention. For example, the Ontario Expropriations Act defines injurious affection to include personal and business damages resulting from the construction of works by the statutory authority. In BC our Expropriation Act does not define injurious affection. Thus the conditions for establishing liability were left to the courts and the ECB prior to its dissolution. In practical terms BC statutory authorities will be liable for losses in the value of the land and not for business losses. The leading author in this area Professor Todd argued that the denial of compensation for damage to business goodwill or loss of profits directly attributable to a public work was "both irrational and unjust"; Law of Expropriation and Compensation in Canada (1992), p. 383. However, in the absence of legislative amendment or a willingness by the courts to reconsider the *Loiselle* criteria, the nature of the damage rule will continue to render local governments immune from business loss claims in injurious affection suits where no land has been physically taken.

III. INJURIOUS AFFECTION IS A STATUTE-BASED CLAIM

The corollary to the first *Loiselle* rule – that the damage must result from an act that was rendered lawful by statute – is that claimants must find a remedy in statute. For local governments there are two distinct statutory sources of compensation liability. Section 41 of the *Expropriation Act* has general application to various governmental authorities:

> 41 (1) In this section, "injurious affection" means injurious affection caused by an expropriating authority in respect of a work or project for which the expropriating authority had the power to expropriate land.
>
> (2) The repeal of the *Expropriation Act*, R.S.B.C. 1979, c. 117, and the amendments and repeals in sections 56 to 128 of the *Expropriation Act*, S.B.C. 1987, c. 23, are deemed not to change the law respecting injurious affection if no land of an owner is expropriated, and an owner whose land is not taken or acquired is, despite those amendments or repeals, entitled to compensation to the same extent, if any, that the owner would have been entitled to had those enactments not been amended or repealed.
>
> (3) An owner referred to in subsection (2) who wishes to make a claim for compensation for injurious affection must make his or her claim by applying to the court, and the court must hear the claim and determine
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> (a) whether the claimant is entitled to compensation, and
>
> (b) if entitled to compensation, the amount of the compensation.

Note that subsection (1) is essentially circular in that injurious affection means injurious affection, with the only qualification that the claim must be connected to a work or project.

Subsection (2) reflects the decision of the provincial government in 1987 not to effect a substantive change in the law with respect to entitlement to compensation. The outcome in an appeal to the Supreme Court of Canada in the *St. Pierre* case that had the potential to change the law with respect to entitlement was pending when the current *Expropriation Act* was enacted. The government decided it would leave it to the courts to determine whether there should be a change in the scope of entitlement. Subsection (2) was the formulation that the drafters crafted to achieve this result. As discussed above, the decision in *St. Pierre* did not expand the scope of entitlement to compensation.

An additional statutory basis for injurious affection compensation in the case of municipalities is found in s. 33(2) of the *Community Charter*:

> 33 (2) If a municipality
>
> > (a) exercises a power to enter on, break up, alter, take or enter into possession of and use any property, or injuriously affects property by the exercise of any of its powers, and
> >
> > (b) exercises a power referred to in paragraph (a) that does not constitute an expropriation within the meaning of the *Expropriation Act*,
>
> compensation is payable for any loss or damages caused by the exercise of the power.

Both s. 41 of the *Expropriation Act* and the predecessor of s. 33(2) of the *Community Charter* were referenced as the basis for paying compensation to the claimant in the Expropriation Compensation Board (ECB) decision in *Jesperson's Brake & Muffler Ltd. v. Chilliwack* which was upheld by the Court of Appeal on this point.

The policy that local governments must compensate property owners for injurious affection in the case of municipal projects stands in stark contrast to the Province itself, at least in the case of highway projects. Section 12 of the *Transportation Act* immunizes the provincial government from injurious affection claims:

> 12 (1) Subject to subsection (2), but despite any other enactment or the common law, no action lies and no proceeding may be brought against the government, the minister or any other person for compensation or damages resulting from injurious affection to land resulting from the exercise of a power provided to, or the performance of a duty imposed on, the minister under this Act or any predecessor Act.

> (2) If the minister expropriates part of the land of an owner, subsection (1) does not apply in relation to the minister if and to the extent that injurious affection results to the unexpropriated remainder of that land.

The policy rationale for leaving local governments exposed to injurious affection claims while eliminating any similar exposure for the Provincial highway authorities is unclear. If the opportunity presents in a joint provincial–municipal highway project, there is an obvious advantage, from the perspective of reducing claims exposure, to having the province take on portions of the project involving access limitations or changes.

IV. INJURIOUS AFFECTION ACCESS LIMITATION CLAIMS

A. The Chilliwack Cases – *Jesperson's Brake & Muffler* and *Reimer Homes*

In 1992 the ECB dealt decided two injurious affection cases from Chilliwack where there was no associated taking. They arose out of the same highway project, an overpass that spanned a main rail line. In the case of the Jesperson's property, before construction of the overpass north and south bound vehicles had direct access into the property. After construction the grade of Yale Road was raised approximately 30 feet. Instead of direct access northbound vehicles had to travel an additional 1750 feet and southbound vehicles 1300 feet to reach the property through routes that the ECB described as "circuitous".

The City argued that the test for injurious affection was a high one and that an owner had to show that the practical utility of the property was virtually eliminated for the uses that existed prior to construction. Further it was argued that the construction must be shown to have been an "unreasonable use of publicly owned land". The ECB concluded that Jesperson's had satisfied the actionable requirement. The Board referred to two earlier road access cases – *Windsor v. Larson* and *Loiselle* where construction of a median in one case and the closure of a road meant access to the properties was much more circuitous after construction. The ECB also relied on an 1882 House of Lords decision, on somewhat similar facts, where the street patterns were changed by construction of an elevated railway making it necessary to travel an additional 1,485 ft. in one direction and 265 ft. in the other to access the property. The ECB characterized the routing to the Jesperson's property as analogous to the land "being located at the end of a cul-de-sac":

> They have been deprived of a substantial value inherent in a corner lot that fronted onto a major thoroughfare with the benefit of a prime address offering access in both directions. Their land is now no longer on a corner and fronts on a lesser street under the overpass with circuitous access to and from Yale Road. It now has an address of significantly less importance. As the evidence revealed, commercial facilities such as brake and muffler outlets have a strong preference to be located on major thoroughfares.

Chilliwack took an appeal to the Court of Appeal, arguing that the ECB had failed to undertake a balancing analysis which should have focused on whether the construction of the overpass amounted to an unreasonable use of the public's lands. In particular, the District emphasized the improvement to traffic safety that the overpass provided. The Court of Appeal rejected the argument, citing the *Windsor v. Larson* and *Loiselle* decisions as not providing any support for a balancing exercise being part of the nuisance liability assessment. The BCCA held that the ECB's legal analysis was correct but provided a more useful statement of the basis for liability:

> Here the Board found that there had been a substantial interference with access to the claimants' lands. The interference was not simply a loss of prospect, loss of view, or loss of privacy or other amenity such as those referred in *St. Pierre.*
>
> The loss of direct access was a substantial interference with the use or enjoyment of this commercial property. The Board held interference to be a compensable loss under the law of injurious affection.

An annotated aerial photo that was included as part of the ECB's reasons is attached at the end of the paper as Appendix A.

The companion case to *Jesperson's*, *Reimer Homes*, resulted in a finding that the City was not liable for injurious affection.

The Reimer property was located on the opposite, south side of the railway from the Jesperson's property. While the construction of the overpass eliminated direct access from Yale Road to the Reimer property, a new ring road meant that the route to the property for northbound vehicles was roughly the same distance as before the overpass construction. For southbound vehicles accessing the property the new approach required travelling under the overpass, an additional distance of 750 feet. The ECB described the new route as circular in design but affording uninhibited and direct access. An annotated aerial photo showing the new approaches to the Reimer property is attached as Appendix B.

Reimer's claim included a loss in amenities, specifically the loss of exposure and view to and from Yale Road. This part of the claim was summarily rejected by the ECB, citing the Supreme Court's decision in *St. Pierre*.

With respect to the claim for interference with direct access the Board concluded, without much discussion, that the construction of the overpass satisfied the actionable requirement. This was rather surprising given that the ECB seemed to have agreed earlier with Chilliwack's submissions that the claimant's land remained "easily accessible" when travelling north and was "equally and conveniently accessible" when travelling south. The Board acknowledged that this was visually evident from an aerial photograph (Appendix B). The ECB held that the elimination of the frontage to the adjacent major highway occasioned by the construction of

the overpass would have been sufficient to maintain a common law claim. This would appear to be setting the bar for liability too low given the recognition that the lands remained conveniently accessible.

In addressing the third factor, the "nature of the damage" rule, the Board determined that the market evidence did not support the claimant's position that there was a substantial loss in value attributable to the construction of the overpass. An unusual factor in the *Reimer* case was that the claimant purchased the property knowing of the City's plans to build the overpass. The Board considered it likely that the purchase price paid by the claimant already reflected any adverse impact of the overpass on the access to the property. In other words, if there was any loss in value, it didn't impact the claimant owner who bought at a "project discounted" discounted price.

Reimer can be summarized as a case where the Board likely reached the right result but not necessarily for the right reason. If one compares the impact on the Reimer property's access from the overpass construction to the impact on the Jesperson's property, it appears much less dramatic. On that assessment the *Reimer* case should have been dismissed on the basis that the actionable requirement had not been met.

B. *Creative Stretch Fabrics v. Pitt Meadows* (ECB 1994)

The claimant's property was located at the southeast corner of the intersection of Harris Road and Lougheed Hwy. As commercial development expanded its west side it became necessary to widen Harris Rd. This included the installation of a median that separated the left turn storage lanes from the southbound lanes. This had the effect of eliminating left-in and left-out access to the claimant's property. Northbound vehicles' access to the property was unaffected. To replace the left-turning access the District provided alternative access via a signalized intersection to the south, two connecting rights of way and a driveway easement.

The case was not a "pure" injurious affection claim as the project had required the expropriation of a small portion of the property for a corner widening. As a result, compensation was determined in accordance with the formula under what is now s. 40 of the *Expropriation Act* respecting partial takings. Under that section compensation is payable for the reduction in the market value of the land, without the claimant having to satisfy the actionable requirement, Under s. 40 if a loss of exposure or similar amenity reduces the market value of the land, such impact is compensable. S. 40 also broadens the compensation to include business losses, something that is excluded under the third condition in the *Loiselle* test. The claimant was relieved of the burden of establishing that the change in access would have amounted to a nuisance at common law but still had to prove that the change in access had a negative impact on the market value of the property.

The Board appreciated that the access for southbound vehicles was longer but it concluded that it was as good, and possibly even better, than the access previously enjoyed. Instead of having

to cross a frequently congested Harris Road, vehicles proceeded south to the signalized intersection, with very little dislocation or delay. The Board considered the alternative access to be a satisfactory arrangement, perhaps another way of saying that it would not amount to an actionable nuisance.

The Board went further to consider whether there was any market evidence to support a finding that there was a reduction in value to the remaining property. Somewhat fortuitously the adjacent property owner had made an offer to purchase the Creative Stretch property and was aware of the District's plans to widen Harris Road and install the median when he made the offer. The value of that offer roughly coincided with the "before project" value estimate of the claimant's appraiser. It was also of some assistance in persuading the Board there was no loss in value that the property did not suffer any loss in exposure, as it continued to enjoy excellent visibility on a main intersection.

The upshot of the *Creative Stretch* case is that providing more circuitous, but also more reliable alternative access post-project, may be good enough to defeat a claim for injurious affection.

C. *Petro Canada v. Vancouver* (ECB 1994; BCCA 1996)

This claim arose out of the construction of the Cambie Street Bridge. The Petro Can site was located at the northeast corner of Cambie Street and Sixth Avenue. The ECB described the before construction access as follows:

Traffic northbound on Cambie Street could apparently access and exit the site directly from Cambie Street, or it could turn right (east) on Sixth Avenue and then turn left into the subject property. There is no clear indication whether traffic travelling south on Cambie Street could make a legal left hand turn onto Sixth Avenue, or turn left directly onto the site.

In the absence of better evidence the Board was unable to conclude that southbound vehicles could make a left turn onto Sixth Avenue before the bridge construction. The effect of the bridge construction was to eliminate the previously existing grade intersection:

> On the east side of Cambie Street there is a considerable grade separation between the roadway on the bridge approach and the elevation of the subject property. In designing the approach to the new bridge, however, the engineers incorporated a third lane northbound; the easterly of the three lanes passes to the east of the bridge approach and continues north at grade as a one-way street. This portion of Cambie Street is, as before, contiguous to and at grade with the subject property. Vehicles using this lane are able to continue north for approximately 250 feet to the controlled intersection at Second Avenue, where they may turn either left or right onto Second Avenue, or continue north and access the new bridge by way of an elevated ramp.

> Vehicles proceeding south on the new bridge can exit onto Second Avenue on separate exit ramps for either eastbound or westbound traffic. In the "after" situation, however, there is absolutely no question that southbound traffic cannot turn, either east or west, onto Sixth Avenue.

West or east bound vehicles could no longer cross Cambie Street due to the grade separation.

The Board took the analysis a bit further than in the Jesperson's and Reimer decisions, looking at the actionable requirement from the perspective of both private and public nuisance liability. With respect to private nuisance, it accepted the rule that nothing short of complete or substantially complete deprivation of access would be actionable at common law. In respect of public nuisance, the Board noted that Cambie St. at the curb lane was now a one way street but considered this as going to inconvenience to the public and, on the authorities, mere inconvenience does not give rise to compensation.

Having engaged in a separate analysis of public versus private access rights, the Board observed that the discussion seemed largely academic, suggesting that decisions on liability were not made with strict adherence to tort law principles. The Board then opted for the approach of looking at more recent decisions given "changing values". It outlined what appeared to be a two part test: there must be a restriction on access that is "severe" and it must result in a loss in value that is "substantial". Although the Board was not clear, its reasons suggested that this two part test was relevant to establishing the "actionable" requirement.

In Petro Can's case it was assumed that it could prove there was a substantial loss in value. On the basis of the Board's approach in *Reimer* this would have been sufficient to establish liability. However, the Board went on to address the second aspect whether the restriction on access was severe. This really turned on the impact on vehicles travelling on Cambie Street. There was no evidence that left turns could be made onto Sixth Avenue in the "before" situation. In the Board's view the main approach to the property had been northbound and the property retained direct access for northbound vehicles. On that basis the Board was not prepared to find that there had been a substantial or significant interference with access to the lands sufficient to constitute a nuisance.

At the Court of Appeal Petro Can argued that the Board had erred by adopting a two part test for actionability. The Court accepted the City's argument that the Board had not actually created a twin test for establishing the actionable requirement. Rather, it interpreted the Board's reference to diminution in value to be a reference to a separate requirement of the four part test for liability – whether there was proven damage to the land.

In the end the Court of Appeal recast the test for the actionable requirement in access cases as being whether there was "substantial or significant interference with access to the claimant's

lands to constitute a nuisance." It found no error in the Board's conclusion that the extent of the interference did not reach this level.

The Court of Appeal's *Petro Canada* decision is important for confirming that value impacts should not influence a court or board's consideration of whether the actionable requirement has been met. While earlier decisions of the Board superficially maintained an analytical separation, its discussion of the market evidence suggests that this influenced its conclusions with respect to the actionable requirement. In *Petro Canada* loss in value goes to satisfy a separate condition in the four part test. The focus of the actionable requirement is proof of a substantial (physical) interference with access.

D. *Antrim's Truck Centre Ltd. v. Ontario (Transportation)* (Ont. Court of Appeal – June 2011)

Before the construction of a new four lane stretch of Hwy 417 Antrim's truck stop had direct access to Hwy 17. Hwy 17 was known as the "killer highway" due to the number of accidents caused by the traffic volume exceeding design capacity. The new section of Hwy 17 rerouted traffic from Hwy 17 and traffic accessing Antrim's from Hwy 417 had to drive a further two kilometers. The Ontario Court of Appeal overturned the Ontario Municipal Board and Divisional Court awards of damages for injurious affection.

The Court conducted a detailed legal analysis of the law of nuisance as part of its assessment of the actionability requirement. It observed that "to constitute a legal nuisance, the annoyance or discomfort must be substantial and unreasonable." In terms of the substantial interference requirement the Court noted some interference is inevitable in an urban setting:

> Particularly as people live in closer proximity to each other, a certain amount, arguably an ever-increasing amount, of interference with each other's property must be tolerated. It makes sense, therefore, that only substantial interference constitutes nuisance.
>
> The requirement that the interference be substantial is a threshold aspect of the test. At this stage of the analysis, the court will exclude claims that disclose no actual interference as well as those in which the interference alleged is so trifling as to amount to no interference at all. (Citations omitted)

As to the separate test of unreasonable interference the Court stated that the focus should be on the gravity of the harm and the utility of the defendant's conduct. In considering the utility of the defendant's conduct, the court examines the importance of the defendant's enterprise and its value to the community. In the Court's view any consideration of the utility of the defendant's conduct necessarily involved the court engaging in a balancing exercise. Here the

Court noted that there was disagreement in the case law as to whether the test for establishing the claim for nuisance involved a balancing of competing interests.

On the one hand, the Court noted that the BC Court of Appeal in *Jesperson's* had explicitly rejected the notion that an analysis of whether nuisance had been made out required a balancing process to determine if the defendant's conduct had been unreasonable. By asserting that the Supreme Court's decision in *St. Pierre* did not lend support to the need for a balancing exercise, the BC Court of Appeal was plainly wrong in the Ontario court's estimation. The Ontario appeal court cited the following passage from *St. Pierre*:

> Moreover, I am unable to say that there is anything unreasonable in the Minister's use of the land. The Minister is authorized - indeed he is charged with the duty - to construct highways. All highway construction will cause disruption. Sometimes it will damage property, sometimes it will enhance its value. To fix the Minister with liability for damages to every landowner whose property interest is damaged, by reason only of the construction of a highway on neighbouring lands, would place an intolerable burden on the public purse. Highways are necessary: they cause disruption. In the balancing process inherent in the law of nuisance, their utility for the public good far outweighs the disruption and injury which is visited upon some adjoining lands. The law of nuisance will not extend to allow for compensation in this case. (Emphasis added.)

The Ontario Court then turned to the following passage from the BC Court's decision in *Heyes* as an indication that our appeal court has now endorsed the view that a balancing process was required as part of the nuisance test:

> In considering the factors relevant to nuisance, the court must recognize the inevitability of competing interests and the need for give and take. As Professor Klar observes in Tort Law, 4th ed. (Toronto: Carswell, 2008) at 715, nuisance "is principally concerned with regulating the conflicting uses of land which invariably arise in an increasingly urbanized and crowded society". A certain degree of inconvenience and interference is inevitable to ensure peaceful co-existence. The task is to determine at what point the process of give and take becomes sufficiently unbalanced to create unreasonable harm that is deserving of compensation.

The Ontario Court noted that there is no mention in the BCCA's *Heyes* reasons of its "contrary position" in *Jesperson's*.

The Ontario Court was clear that courts must undertake a balancing of the competing interests of the parties as part of the liability assessment:

> This conclusion is consistent with the primary function of the law of nuisance; namely, to strike an appropriate balance between the defendant's interest in using its property as it pleases and the plaintiff's interest in the unfettered use and enjoyment of her land. The Supreme Court expressed it this way in Tock, at p. 1191: "the very existence of organized society [depends] on a generous application of the principle of 'give and take, live and let live'".
>
> In my opinion, the important principles of tolerance and accommodation necessary to sustain harmony among neighbours in an increasingly dense and complex society require a balancing of the interests of both parties to determine whether it is appropriate for the court to intervene to preserve the right of either to use their property as they wish.

In undertaking the balancing of Antrim's interests with those of the Ministry, the court emphasized the public safety concerns:

> It was universally accepted that the existing highway was inadequate for the level of traffic that used it. Accordingly, an upgrade was necessary. The new highway needed to be significantly different from the old to resolve the safety concerns. The MTO ultimately decided that this required a new route and changes to the surrounding road network. The interference, therefore, was not only reasonable, given the character of the neighbourhood, it was the product of a project, undertaken in the public interest, which was essential to the safety of the neighbourhood.

The Court of Appeal then noted the error of the lower tribunal in not taking into account the utility of the project:

> The other significant concern arising from the reasonableness analysis is the board's failure to adequately take the utility of the MTO's conduct into account. This utility is obvious. Highways are necessary: this one particularly so given the public safety issue. There is no debate that the actions of the MTO were not only socially beneficial, but also necessary.

From the perspective of local governments that have the responsibility to carry out road projects that deliver safety and traffic efficiency benefits, the decision in *Antrim* is welcome. The decision does not represent any real change in the law of nuisance that underlies the law of injurious affection. Rather, the Court drew on principles expressed in decisions from the

highest court, but which appeared to have been lost sight of when applied to injurious affection claims.

The decision in *Antrim* has highlighted the conflicting positions between the Ontario Court and our Court of Appeal in the *Jesperson's* case on the question of whether it is necessary to undertake a balancing analysis in determining if the actionable requirement has been met in an injurious affection case. A conflict between provincial courts of appeal on an issue of law is a significant consideration in determining whether a case merits the attention of the Supreme Court of Canada. Antrim filed an application for leave to appeal to the Supreme Court of Canada at the beginning of September. Hopefully the Supreme Court will see fit to grant leave. The fact that our Court of Appeal in *Heyes* made statements more consistent with the balancing approach adopted in *Antrim*, and rejected in *Jesperson's*, may influence the high court to take the case up and provide some needed clarity.

V. CONCLUSION

Where the dividing line lies between access impacts that require compensation and those that do not is not entirely clear. The decisions suggest that each injurious affection case must be critically examined on its own facts. There have been no BC decisions on "pure" injurious affection based on access limitations since *Petro Canada*. Unless and until the Supreme Court of Canada provides clarity as to whether a balancing exercise is required as part of the liability assessment, the *Jesperson's* decision will continue to loom large as a reminder that at some point the impact on access may be considered too substantial and compensation may become payable.

Aggrieved property owners can be expected to argue that they should not be left to bear a disproportionate burden of the costs of highway improvement projects by not being compensated where the value of their properties are reduced through access changes. However, there is a compelling argument that the benefits of highway improvement projects as provided through safety improvements and more efficient traffic flows have not been adequately taken into in BC and weighed against the adverse impact on private property values.

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